Before the
Administrative Hearing Commission
State of Missouri

MISSOURI REAL ESTATE COMMISSION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 11-1359 RE
	)	
BELLINGTON PROPERTIES, INC., and MICHAEL B. FOX,	)	
	)	
Respondent.	)	

DECISION

We find cause to discipline the real estate licenses of Bellington Properties, Inc. ("Bellington") and Michael B. Fox ("Fox") for mishandling client funds.

Procedure

The MREC filed a complaint with us on June 30, 2011 seeking to discipline Fox's real estate broker's license and Bellington's real estate corporation license. We mailed our notice of complaint/notice of hearing to respondents on July 6, 2011. The MREC filed an amended complaint on August 31, 2011. With our leave, Bellington filed an answer to the amended complaint on November 15, 2011. On November 21, 2011, Fox responded to the amended complaint by complaint asserting his rights under the Fifth Amendment of the United States Constitution and Section 19 of the Constitution of the State of Missouri, and declining to answer the amended complaint.

We held a hearing on December 13, 2011. The MREC appeared by counsel Erwin R. Frownfelter, Assistant Attorney General. Bellington appeared by Vincent D. Vogler of The Vogler Law Firm. Fox did not appear but was represented by Gregory N. Smith of Margulis, Grant & Margulis, P.C. The case became ready for our decision on February 6, 2012, the date the last written argument was filed.

Evidentiary Issue

The MREC served a request for admissions on Bellington on November 10, 2011. Bellington did not respond to the request in the manner set forth in Supreme Court Rule 59.01(d). Under Rule 59.01(a), the failure to answer a request for admissions establishes the matters asserted in the request, and no further proof is required. *Killian Constr. Co. v. Tri-City Constr. Co.*, 693 S.W.2d 819, 827 (Mo. App., W.D. 1985). Such a deemed admission can establish any fact or any application of law to fact. *Linde v. Kilbourne*, 543 S.W.2d 543, 545-46 (Mo.App. W.D. 1976). That rule is made applicable to cases before this Commission pursuant to 1 CSR 15-3.420(1).[1]

Fox declined to answer the MREC's amended complaint and its request for admissions served on him on November 1, 2011, responding to both by invoking his right against self-incrimination under the Fifth Amendment to the United States Constitution and Article I, §19, of the Missouri Constitution. While a party is permitted to assert its privilege as a protective shield, it is not allowed to fashion that privilege into a sword to strike out an adverse inference warranted by the circumstances. *Johnson v. Missouri Bd. of Nursing Home Adm'rs*, 130 S.W.3d 619, 632 (Mo. App. W.D. 2004), citing *United States v. Rylander*, 460 U.S. 752, 758 (1983). Fox's assertion of his Fifth Amendment privilege does not, in itself, concede any facts but we are

[1] All references to "CSR" are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

justified in drawing a negative inference from his refusal to answer unless that inference is overcome or rebutted by contrary evidence. *Id.*

Findings of Fact

1. Fox possessed a Missouri real estate broker license at all times relevant to these proceedings.
2. At all relevant times, Bellington, a Missouri corporation, held a Missouri real estate corporation license.
3. Fox was the designated broker for Bellington at the time of the events in question.

Facts relating to Count I

4. Bellington maintained a real estate escrow account with Regions Bank ("the Regions Bank escrow account").
5. In May 2008, the MREC randomly selected Fox and Bellington for an audit.
6. Between July 1, 2008, and July 3, 2008, Jennifer Johnson, an MREC examiner, led a team that conducted an audit of Fox and Bellington.
7. On July 2, 2008, Bellington's Regions Bank escrow account contained a balance of $13,549.70. Only $200.00 was earnest money in dispute; the balance was overages in the account in the amount of $13,329.70.
8. The overages noted in the Regions Bank escrow account arose as a result of the following transactions, in which Bellington's reason for retaining the funds did not appear from its records:
    a. $1500.00 from a transaction between Eighteen Investments Inc., seller, and Givens and Collins-Givens, buyers, which closed on May 30, 2008;
    b. $2400.00 from a transaction between Eighteen Investments Inc., seller, and Club, buyer, which closed on May 9, 2008;

c. $500.00 related to a transaction involving 4790 Fiji, dated March 11, 2008;

d. $500.00 related to a transaction involving 6989 Lagrange, dated November 19, 2007;

e. $6500.00 related to a transaction involving 620 Monroe, dated June 3, 2008;

f. $200.00 related to a transaction involving 2927 Oldewick, dated May 13, 2008;

g. $6500.00 related to a transaction involving 2560 Pheasant, dated June 3, 2008;

h. $500.00 related to a transaction involving 660 St. Edith, dated December 21, 2007; and

i. $1000.00 related to a transaction involving 2146 Yale, dated November 5, 1998.

9. In a transaction between Eighteen Investments, Inc. and Elaine Moranville which closed on March 14, 2008, Fox failed to make a disbursement of $1000.00 until April 17, 2008. Fox's failure to make a timely disbursement caused a temporary overage in Bellington's escrow account of $1000.00 from March 20, 2008, to April 17, 2008.

10. In a transaction between Eighteen Investments, Inc. and Andrew Bolte which closed on May 8, 2008, Fox did not disburse $1000.00 from the escrow account until May 19, 2008. Fox's failure to timely disburse the funds caused a temporary overage of $1000.00 in Bellington's escrow account between May 15, 2008, and May 19, 2008.

11. On two occasions, Bellington deposited funds into its sales escrow account which were property of the agency and not escrows for buyers:

    a. On June 28, 2007, a cash deposit of $106.90;

    b. On March 11, 2008, $500.00, representing a security deposit on a rental of 4790 Fiji by Greg Marshall.

12. Bellington's agents failed to sign and/or date brokerage disclosure agreements on the following occasions:

    a. Special sale contract to David A. Marchbanks, July 7, 2007 (not dated);

    b. Special sale contract to Homesforrehab, LLC, June 21, 2007 (not signed or dated);

    c. Special sale contract to Trey Smith, July 7, 2007 (not dated) and June 17, 2008 (not signed or dated)

    d. Prothetic Investments, LLC, May 24, 2006 (not signed or dated);

    e. Aaron Smith, February 7, 2008 (not signed or dated);

    f. Elaine A. Moranville, February 15, 2008 (not signed or dated);

    g. Clifton J. Robinson, February 29, 2008 (not signed or dated);

    h. Dan Scott, March 1, 2008 (not signed or dated);

    i. Randy Wood, April 10, 2008 (not dated);

    j. Jonathan E. Collins, May 6, 2008 (not signed);

    k. Andrew Bolte, April 16, 2008 (not signed or dated);

    l. Susan K. Purcell, March 20, 2008 (not signed or dated);

    m. Claude Zoss, June 3, 2008 (not signed).

13. On June 20, 2008, Bellington's agent, Martin Benjamin Levin, executed a special sale contract to sell property to Lacretia Hawkins, as buyer. Levin indicated in the disclosure agreement he was acting as buyer's agent, but Bellington only had a listing agreement on behalf of the seller.

14. On twenty-two occasions, Bellington's agents executed the following written brokerage disclosure statements which did not identify the source or sources of compensation:

a. Homesforrehab, LLC, June 21, 2008;

b. Roshonda Brown and Cornelius Rainey, June l0, 2008;

c. Lacretia Hawkins, June 23, 2008;

d. Kristen S. Jefferson, June 6, 2008;

e. Claude Zoss, June 3, 2008;

f. CS Investment Properties, May 14, 2008;

g. Kenneth and Ellen John, May 4, 2008;

h. Karen DeRoy, May 19, 2008;

i. Shawanda L. Collins-Givens and Duane Givens, May 8, 2008;

j. Trey Smith (Blendon and Gayola), June 17, 2008;

k. Aaron Smith, February l4, 2008;

l. Keith and Constance Johnson, February 29, 2008;

m. Danielle Jean Magruder, April 4, 2008;

n. Trudy Wood, April 9, 2008;

o. Jonathan E. Collins, May 6, 2008;

p. Lacretia Hawkins, May 2, 2008;

q. Andrew Bolte, April l0, 2008;

r. Susan K. Purnell, March 20, 2008:

s. Kent Boyer, February 2, 2008;

t. Kenneth Paul McCleod and Edna Kincade, April 19, 2008;

u. Sushant Kale and Hubhangi Peche, May 6, 2008.

15. Bellington's agents prepared and executed the following real estate contracts, which failed to specify the city in which the property was located:

a. David Marchbanks, July 10, 2007;

b. Kenneth and Ellen John, May 4, 2008;

c. Karen DeRoy, May 19, 2008;

d. Trey Smith, June l7, 2008;

e. Aaron Smith, February 2, 2008;

f. Cliffton J. Robinson, February 29, 2008;

g. Lacretia Hawkins, May 2, 2008.

16. On June 17, 2008, Bellington's agent Michael Litz prepared and executed a special sale contract for the proposed conveyance of property at 2138 Blendon to Trey Smith, which failed to address the issue of earnest money.

17. On October 17, 2008, Bellington agent Michael Fox prepared and executed a Special Sale Contract for proposed conveyance of property at 4636 Varrelmann to Ovidiu Joitescu, which specified $5000 in earnest money was to be delivered to Bellington by the buyer. Bellington failed to collect the earnest money from the buyer.

18. Fox referred business to a company with whom he had a controlled business arrangement without making a written disclosure to the person whose business was referred.

Facts relating to Count II

19. Between November 16, 2009, and February 3, 2010, the MREC conducted a re-audit of Fox and Bellington's records.

20. The accuracy of Bellington's property management escrow accounts could not be verified from Bellington's records because:

a. Owner statements were not provided to any owners;

b. The check registers provided were unverifiable due to checks bearing the same numbers being issued to multiple payees with different amounts on each check;

c. Gaps occurred in check sequences with no explanation of missing check numbers;

d. Checks shown as voided on the check register actually cleared the bank;

e. Checks were written with no related transaction indicated on the check or in the check register;

f. Electronic debits appearing on the bank statement did not correspond to any related transaction on the check register;

g. Wire memo transfers were made which were not recorded as any to any related transaction;

h. Deposits booked as income on one account were actually deposited to different accounts;

i. The check register had not been reconciled between March 2009 and December 2009.

21. Deposits booked by Bellington to its property management escrow account were actually deposited into the owner operating account of Eighteen Investments, a related but separate company.

22. The audit revealed Bellington's Regions Bank escrow account had temporary shortages on the following occasions because Bellington did not place broker funds into the account to cover bank service fees:

a. $8.11 from 3/9/09 - 4/9/09;

b. $27.08 from 4/9/09 - 5/11/09;

c. $46.17 from 5/11/09 - 6/9/09;

d. $70.75 from 6/9/09 - 7/9/09;

e. $93.78 from 7/9/09 – 8?/10/09;

f. $114.34 from 8?/10/09 - 9/9/09;

g. $136.56 from 9/9/09 - 10/9/09;

h. $156.22 from 10/9/09 - 11/12/09.

23. On April 7, 2009, Bellington executed a sales contract with Syed and Asma Rizvi, which required Bellington to hold $2500 earnest money from the Rizvis in escrow. The sale contract stated the closing date would be May 1, 2011.

24. Bellington did not deposit the Rizvi earnest money into its Regions Bank Sales Escrow Account until April 28, 2009.

25. On August 26, 2009, Bellington released the Rizvis' earnest money from the escrow account and transferred it directly to Eighteen Investments.

26. Bellington deposited funds required to be held in escrow into an account at the National City Bank, which was not registered as an escrow account with the MREC.

27. Bellington's agents failed to keep records necessary for the MREC to determine the adequacy of the National City account:

a. Bellington was unable to provide a register of outstanding checks for the beginning of the audit period;

b. Deposits made into the National City account were recorded as deposits into the Royal Bank account; and

c. Owners were not provided with owners' statements.

28. Charges and transfers were made from Bellington's National City account, which resulted in shortages in the account ranging from $8000 to $25,000 during the audit period, including:
    a. $363 in bank service charges deducted from the account, with no corresponding deposit of broker funds;
    b. On March 11, 2009, $4500 transferred to Greg Bauer Services, Inc. via check #12395;
    c. On December 17, 2008, $8000 transferred to the Bellington Properties operating account, via check #12392;
    d. On October 26, 2009, $12,500 transferred to Eighteen Investments via checks #12394 and #12395 on August 13, 2009.
29. Bellington deposited funds required to be held in escrow into an account at Royal Bank, which was not registered with the MREC as an escrow account.
30. During the audit period, 342 checks drawn upon Bellington's Royal Bank account were returned for insufficient funds, including:
    a. In December 2008, 43 checks returned for insufficient funds;
    b. In January 2009, 30 checks returned for insufficient funds;
    c. In February 2009, 2 checks returned for insufficient funds;
    d. In March 2009, 47 checks returned for insufficient funds;
    e. In April 2009, 54 checks returned for insufficient funds;
    f. In May 2009, 36 checks returned for insufficient funds;
    g. In June 2009, 6 checks returned for insufficient funds;
    h. In July 2009, 43 checks retuned for insufficient funds;

i. In August 2009, 68 checks returned for insufficient funds;

j. In September 2009, 13 checks returned for insufficient funds.

31. Bellington wrote 76 checks on the Royal Bank account which resulted in overdrafts due to insufficient funds, and $15,559.30 in bank service fees. These fees were not balanced by identifiable infusions of broker funds into the account.

32. On numerous occasions, Bellington commingled its funds with those of its agents in the Royal Bank account.

33. On three occasions, instead of depositing rent payments into its Royal Bank account as it recorded, Bellington deposited the funds directly into an operating account for Eighteen Investments at Lindell Bank:

a. On November 3, 2009, Bellington recorded $12,806.75 in rent receipts for deposit into the Royal Bank account, but deposited those funds into Eighteen Investments' Lindell Bank account;

b. September 24, 2009, Bellington recorded $2,700 in rent receipts for deposit into the Royal Bank Account, but deposited the funds into Eighteen Investments' Lindell Bank account;

c. April 14, 2009, Bellington recorded $1,100 in rent receipts for deposit into the Royal Bank Account, but deposited the funds into Eighteen Investments' Lindell Bank account.

34. As of November 30, 2009, Bellington's rent roll reflected a balance of $516,990.43, but its Royal Bank account only contained a balance of $6186.02.

35. Bellington received cash deposits of $2375 which were not deposited into an escrow account.

36. Between December 1, 2008 and December 31, 2008, Bellington managed property for the following entities without a property management agreement for 2008:

    a. Peak LLC;

    b. Cinnamon Partnership LLC;

    c. Big Bend Partnership LLP

    d. Hewlett Investments Inc.

    e. McKnight Mann LLC

    f. Bell Mortgage Partnership

    g. Eighteen Investments Inc.

    h. Flow Partnership LLP

    i. Bell Sunset LLC

    j. Bell Sutton LLC

    k. Bell-Clayshire LLC

    l. Bell Rose LLC

    m. Bellington Properties Inc.

    n. Hackberry LLC

    o. Bell Scott LLC

    p. Clayton Forum Partnership LLP

    q. Bell MGM LLC

    r. Forum Partnership LLP

    s. Bell NY LLC

    t. Meramec Partnership LLP

    u. 202 LLC

v. Bell 232 Partnership LLP

w. TD Parkdale LLC

x. G. Stafford and Co.

y. Anacott Properties LLC

z. S & P Properties Inc.

aa. Bellaway LLC

bb. 9910 LLC

37. On the following occasions, Bellington advertised properties for sale at a price different than the price authorized by the listing contract:

a. On November 17, 2009, Bellington advertised 709 Robert Ave. at the price of $59,900, but had authority to sell it only at the price of $89,900;

b. On November 16, 2009, Bellington advertised 3712 Fairview at the price of $74,500, but had authority to sell it only at the price of $90,000.

38. On November 17, 2009, Bellington agents advertised a property at 23 Girard Dr. for sale without written authorization from the owner.

39. In the following listing agreements, Bellington did not properly identify the property by noting its city and/or street address:

a. April 2, 2007, 3712 Fairview (no city);

b. July 2, 2007, 709 Robert (no city);

c. October 20, 2009, a property in Creve Coeur (no street address).

40. Bellington's listing agreements did not properly state the terms and conditions under which the property was to be sold by failing to describe the home warranty, the minimum commission, the protection period, and/or the minimum listing commission:

a. April 2, 2007, 3712 Fairview (warranty not addressed);

b. July 2, 2007, 709 Robert (warranty not addressed);

c. October 20, 2009, a property in Creve Coeur (minimum commission, protection period and minimum listing commission not addressed);

d. June 3, 2008, 8054 1S Davis Pl. (warranty not addressed);

e. September 18, 2009, 10371 Forest Brook #D (warranty not addressed);

f. June 18, 2009, 7704 Thomas Ave. (warranty not addressed).

41. On January l, 2009, Bellington entered into a Property Management Agreement with Bell Mortgage Partnership which did not note the addresses of the properties to be managed.

42. On the following dates, Bellington executed property management agreements with owners that failed to include a clause permitting or prohibiting Bellington from acting as a transaction broker:

a. January 1, 2009, Peak LLC;

b. January 1, 2009, Cinnamon Partnership LLC;

c. January l, 2009, Big Bend Partnership;

d. January l, 2009, Hewlett Investments, Inc.;

e. January 1, 2009, McKnight Mann LLC;

f. January 1, 2009, Bell Mortgage Partnership.

43. On April 6, 2009, Martin Benjamin Levin, a Bellington agent, disclosed in a sales contract for 218 Clear Meadows Dr. that he was the buyer's agent, but had no such written agency agreement with the buyer.

44. Bellington entered into agreements relating to the following properties without making a written disclosure of its brokerage relationship:

a. 138 W. Adams (Messerly);

b. 411 W. Adams (Ulrich);

c. 3821 Affirmed (Lee);

d. 2205 Alameda (Sutherland);

e. 1390 Arlington (McHaynes);

f. 2276 Blendon (Morgan);

g. 11319 Cadigan (Lee);

h. 3448 Cambridge (Morrison);

i. 3634 Cambridge (Smith/Rector);

j. 2615 Cecelia (Wagnon);

k. 1016 Commodore lst Floor (Vance);

l. 680 Crowder (Lagant);

m. 6734 Dale (Bishop);

n. 7525 Delmar (Lauer);

o. 30 Derharke (Riley);

p. 845 Diversey (Campbell);

q. 1370 S. Duschesne (Blissett);

r. 2158 East Dr. (Wall);

s. 1102 Edgehill (Huddlen);

t. 101 Eldridge (Bauer);

u. 7917 Elinor Ave (Harris);

v. 439 E. Elliott (Connors);

w. 2306 High School (Doebber);

x. 2813 Hilldale (Meisemann);

y. 2312 Hilton (Tobin);

z. 1139 Sturgis (Homan).

45. Bellington agents executed written brokerage disclosure statements which did not identify the source(s) of compensation in connection with the following agreements:

a. 140 W. Adams (Utterback)

b. 1023 S. Big Bend Blvd. (Pointer's Pizza, Inc.)

c. 1526 S. Big Bend Blvd. (Memory Care Home Solutions)

d. 1528 S. Big Bend Blvd. (The Maids Home Services)

e. 8135 Manchester (First Choice Payment Solutions)

f. 3667 McRee Ave. (Gonzalez).

46. Bellington agents executed written brokerage disclosure statements without confirming that brokerage relationships were disclosed to the tenants or their respective agents no later than the first showing, upon first contact, or immediately upon the occurrence of any change to that relationship, in the following agreements:

a. 140 W. Adams (Utterback)

b. 1023 S. Big Bend Blvd. (Pointer's Pizza, Inc.)

c. 1526 S. Big Bend Blvd. (Memory Care Home Solutions)

d. 1528 S. Big Bend Blvd. (The Maids Home Services)

e. 8135 Manchester (First Choice Payment Solutions).

47. Bellington's agent failed to sign and/or date the following brokerage disclosure statements:

a. 8531 Antler (Klorer) (not signed or dated);

b. 708 Lavinia Pl. (Hughes) (not dated);

c. 1528 S. Big Bend Blvd. (The Maids Home Services) (not dated).

48. Bellington agents executed sale contracts which failed to state the city in which the relevant properties were located:

a. 8531 Antler (Klorer);

b. 218 Clear Meadows (Rizvi);

c. 602 Rosetta Unit E (Scales);

d. 556 Bedford Ave. (Renu Properties LLP).

49. Bellington failed to retain a copy of the buyers' closing statements in the following transactions:

a. 556 Bedford Ave. (Renu Properties LLP);

b. 3008 Oriental (Quinn/Lang);

c. 602 Rosetta Unit E (Scales);

d. 708 Lavinia Pl. (Hughes);

e. 747 Club Ln. (Makovec);

f. 3667 McRee Ave. (Gonzalez).

50. Bellington failed to retain vendor invoices for the following checks:

a. Check #31910 to Investors Title, in the amount of $81.00;

b. Check #32176 to MSD, in the amount of $37.31;

c. Check #32355 to The Home Depot Commercial, in the amount of $1739.98;

d. Check #32557 to Missouri American Water Co., in the amount of $28.79;

e. Check #32602 to O'Connor Properties Services, in the amount of $1000.00;

f. Check #32919 to KCP&L, in the amount of $217.25;

g. Check #33728 to Michael Litz, in the amount of$1018.18;

h. Check #33310 to Fed Ex Kinkos, in the amount of $50.00;

i. Check #33732 to A./MX Disposal Service, in the amount of $37.80;

j. Check #33767 to Shawn Groenke, in the amount of $15 1.27;

k. Check #34056 to Lisa Fox, in the amount of $50.00;

l. Check #33858 to Schulze Glass LLC, in the amount of $1250.00

m. Check #34433 to Bellington Realty, in the amount of $2149.52;

n. Check #34478 to Brentwood Supply, in the amount of $91.93.

Conclusions of Law

We have jurisdiction over the MREC's complaint. § 621.045.[2] The MREC has the burden of proof. *Missouri Real Estate Commission v. Berger*, 764 S.W.2d. 706, 711 (Mo. app., E.D. 1989).

As the MREC seeks discipline under numerous statutes and regulations, we examine each alleged violation in turn.

I. Count I

A. Overages in Bellington's Sales Escrow Account

The MREC argues Bellington violated § 339.105.1[3] and 20 CSR 2250-8.120(4) when its Regions Bank escrow account contained a balance of $13,549.70, of which Bellington's records could only account for $200.00 as earnest money in dispute. The overages arose as a result of several transactions in which Bellington's reason for retaining funds did not appear in its records.

Section 339.105.1 provides:

[2]All statutory references are to the Revised Statutes of Missouri (Supp. 2012), unless otherwise noted.
[3] Statutory references, unless otherwise noted, are to the Revised Statutes of Missouri, 2012 Supplement.

> Each broker who holds funds belonging to another shall maintain such funds in a separate bank account in a financial institution which shall be designated an escrow or trust account. This requirement includes funds in which he or she may have some future interest or claim. Such funds shall be deposited promptly unless all parties having an interest in the funds have agreed otherwise in writing. *No broker shall commingle his or her personal funds or other funds in this account with the exception that a broker may deposit and keep a sum not to exceed one thousand dollars in the account from his or her personal funds, which sum shall be specifically identified and deposited to cover service charges related to the account.*

(Emphasis added.)

20 CSR 2250-8.120(4) provides:

> Each broker shall deposit into the escrow or trust account all funds coming into the broker's possession as set out in section 339.100.2(1), RSMo, including funds in which the broker may have some future interest or claim and including, but not limited to, earnest money deposits, prepaid rents, *security deposits,* loan proceeds, and funds paid by or for the parties upon closing of the transaction. No broker shall commingle personal funds or other funds in the broker's escrow account except to the extent provided by section 339.105.1, RSMo. *Commissions payable must be removed from the escrow account at the time the transaction is completed. After the transaction is completed, interest payable shall be disbursed to the appropriate party(ies) from the escrow account no later than ten (10) banking days following the receipt of the next statement of the escrow account.* When the licensee receives all interest earned, interest payable to a licensee must be removed from the escrow account within ten (10) banking days following the receipt of the next statement of the escrow account.

(Emphasis added.)

Section 339.105.1 and 20 CSR 2250-8.120.4 permit a broker to maintain funds in an escrow account only until such time as the funds are required to be distributed to a party to the transaction. The overage in Bellington's escrow account arose from the failure to disburse funds as we set out in finding of fact number 8 above.

Bellington admits there were numerous instances of overages found in its escrow account, and the reason for retaining the funds in the account could not be ascertained from the

company's records.[4] While a broker may keep $1000 or less in personal funds in the escrow account, if specifically identified, to cover service charges related to the account (which, we note, Bellington did not do), the amount of overages here far exceeds that amount. Bellington's conduct violated § 339.105.1 and 20 CSR 2250-8.120(4). We find cause to discipline Bellington under these provisions.

B. Commingling

The MREC contends Bellington deposited funds into its sales escrow account on June 28, 2007 and on March 11, 2008 that were not escrows for buyers . The source of the June 28 cash deposit was not identified; the March 11 deposit represented a security deposit on a rental. Bellington admits the conduct, and that it violated § 339.105.1 and 20 CSR 2250-8.120(4).[5]

While 20 CSR 2250-8.120(4) specifically permits security deposits to be deposited into an escrow account, the unidentified cash deposit violated both the regulation and § 339.105.1 because the broker's funds were commingled with other funds in the escrow account. We find Bellington violated § 339.105.1 and 20 CSR 2250-8.120(4).

C. Failure to sign and/or date brokerage disclosure agreements

The MREC argues the failure of Bellington's agents to sign and/or date brokerage disclosure agreements on thirteen separate occasions violated 20 CSR 2250-8.096(1)(A)(6), which states:

> Licensees acting with or without a written agreement for brokerage services pursuant to sections 339.710 to 339.860, RSMo, are required to have such relationships confirmed in writing by each party to the real estate transaction on or before such party's first signature to the real estate contract. Nothing contained herein prohibits the written confirmation of brokerage relationships from being included or incorporated into the real estate contract, provided that any addendum or incorporated document

[4] Petitioner's Exhibit 2, Petitioner's Request for Admissions to Respondent Bellington, #10.
[5] Petitioner's Exhibit 2, Petitioner's Request for Admissions to Respondent Bellington, #15.

> containing the written confirmation must include a separate signature section for acknowledging the written confirmation that shall be signed and dated by each party to the real estate transaction.
>
> (A) Written confirmation must--
>
> *****
>
> 6. Be signed and dated by the disclosing licensees on or before the contract date[.]

Bellington admits its agents failed to sign and/or date these brokerage disclosure agreements in violation of this regulation.[6] Such conduct is cause to discipline Bellington under 20 CSR 2250-8.096(1)(A)(6).

D. Misidentification of agency in disclosure agreement

The MREC contends Bellington violated 20 CSR 2250-8.096(1)(A)(6) when its agent, Levin, executed a special sale contract with Lacretia Hawkins, in which he disclosed he was acting as buyer's agent. In fact, Bellington's listing agreement only authorized Levin to act on the seller's behalf. Bellington admitted this conduct and the violation.

The regulation required Levin to disclose his representation of the seller to Hawkins, and to have her sign an acknowledgment of such disclosure. Conversely, if Levin was, in fact, acting as a dual agent on behalf of the seller and Hawkins, each party must sign an acknowledgement of this disclosure. Levin failed to do either. From these facts, we find cause to discipline Bellington's license under 20 CSR 2250-8.096(1)(A)(6).

E. Failure to identify the source of compensation

Bellington's agents executed 22 written brokerage disclosure statements which did not identify the source or sources of compensation. The MREC argues this conduct violated 20 CSR 2250-8.096(1)(A)(2), which provides:

[6] Petitioner's Exhibit 2, Petitioner's Request for Admissions to Respondent Bellington, #16.

> (1) Licensees acting with or without a written agreement for brokerage services pursuant to sections 339.710 to 339.860, RSMo, are required to have such relationships confirmed in writing by each party to the real estate transaction on or before such party's first signature to the real estate contract. Nothing contained herein prohibits the written confirmation of brokerage relationships from being included or incorporated into the real estate contract, provided that any addendum or incorporated document containing the written confirmation must include a separate signature section for acknowledging the written confirmation that shall be signed and dated by each party to the real estate transaction.
>
> (A) Written confirmation must--
>
> *****
>
> 2. Identify the source or sources of compensation[.]

Bellington's admitted failure to identify the source of its compensation in these written disclosure statements as required is cause for discipline under 20 CSR 2250-096(1)(A)(2).

F. Failure to specify the location of the property

Bellington's agents prepared and executed seven contracts which did not specify the city where the property was located. The MREC contends this conduct violated 20 CSR 2250-8.100(1):

> Every licensee shall make certain that all of the terms and conditions authorized by the principal in a transaction are specified and included in an offer to sell or buy and shall not offer the property on any other terms. Every written offer shall contain the legal description or property address, or both, and city where the property is located, or in the absence of, a clear description unmistakably identifying the property.

Bellington admitted the city in which the property was located was omitted from these seven contracts, and that this conduct violated the regulation. However, 20 CSR 2250-8.100(1) does not require that a licensee identify the city in every circumstance. The regulation sets out four acceptable options for the description of real property in a written offer:

> (1) The legal description and city where the property is located.

(2) The property address and city where the property is located.

(3) Both the legal description and the property address, with the city where the property is located.

(4) Both the legal description and the property address, and in the absence of the city where the property is located, a clear description unmistakably identifying the property.

The MREC did not offer any of the seven contracts as evidence, and relies solely on Bellington's admission. Although Bellington admitted its conduct violated this regulation, the evidentiary record is insufficient to allow us to determine whether the contracts complied with 20 CSR 2250-8.100(1) by including an otherwise clear description unmistakably identifying the property, along with the legal description and property address. Therefore, we find the MREC failed to meet its burden of proof as to this alleged violation of 20 CSR 2250-8.100(1).

G. Failure to address earnest money

The MREC contends Bellington's agent, Michael Litz, violated 20 CSR 2250-8.100(1) when he prepared and executed a special sales contract to convey property at 2138 Blendon to Trey Smith which did not address the issue of earnest money. The regulation requires, in relevant part, that "every licensee shall make certain that all of the terms and conditions authorized by the principal in a transaction are specified and included in an offer to sell or buy and shall not offer the property on any other terms."

Bellington admitted these facts and the violation.[7] However, the regulation does not require that earnest money be addressed in a sales contract unless it is a term or condition authorized by the principal. The MREC presented no evidence that the principal in this transaction authorized the inclusion of earnest money as term or condition in the special sale

[7] #19

contract. Therefore, we do not find cause to discipline Bellington for violating 20 CSR 2250-8.100(1).

H. Failure to collect earnest money

Bellington's agent and designated broker, Michael Fox, failed to collect the $5000 earnest money specified in the contract he prepared and executed for a conveyance of property at 4636 Varrelman. The MREC argues this conduct violated 20 CSR 2250-8.100(1), which states in relevant part, "every licensee shall make certain that all of the terms and conditions authorized by the principal in a transaction are specified and included in an offer to sell or buy and shall not offer the property on any other terms."

This regulation does not require a licensee to collect earnest money; rather, it addresses what terms and conditions a licensee must include in a written offer to buy or sell property. Certainly, by failing to collect the earnest money specified in this transaction, Fox failed to *implement* a stated term in the sales contract. Such failure may be grounds for discipline under some other regulation or statute, but we cannot find discipline for uncharged conduct. *Dental Bd. v. Cohen*, 867 S.W.2d 295, 297 (Mo. App., W.D. 1993). We can find cause for discipline only on the law cited in the complaint. *Sander v. Missouri Real Estate Comm'n*, 710 S.W.2d 896, 901 (Mo. App., E.D. 1986). As Fox included the delivery of earnest money to Bellington as a term in the written sale contract, we find no violation of 20 CSR 2250-8.100(1).

I. Lack of written disclosure

MREC argues Fox violated 20 CSR 2250-8.110(4)(B), which states:

> A licensee who has a controlled business arrangement with a provider of settlement services and who, directly or indirectly, refers business to that provider or affirmatively influences the selection of that provider shall disclose the arrangement to the person whose business is referred or influenced. This disclosure shall be given on a separate form and shall be signed by the person whose business is referred or influenced. The disclosure shall be given and signed before or at substantially the same

time that the business is referred or the provider is selected. The licensee shall retain a copy of the signed form.[8]

The testimony of Jennifer McMullen attempted to establish that Fox, in his capacity as broker, referred a client to Eighteen Investments, LLC for financing, without making a written disclosure to his client of his interest in that company:

> Q. **[MREC attorney]** … there was a statement in the audit report that the broker [Fox] had referred business to a company in which he had a controlled interest. Do you recall the basis of that finding?
> A. **[McMullen]** On several of the contracts, we noticed - - because they had a front sheet. It kind of gave us more information than we needed. The broker owned his own investment firm, Eighteen Investments, and was loaning the clients money and was also representing the client as the broker and was earning money off of it. It's kind of confusing.
> Q. And what was he required to do under those circumstances?
> A. All he needed to do was disclose to his clients that he was earning a fee from Eighteen Investments, the lending company.[9]

Bellington admitted "Fox referred business to a company with whom he had a controlled business arrangement, without written disclosure to the person whose business was referred, in violation of 20 CSR 2250-8.110(4)(B)."[10] This admission is not dispositive; we must "separately and independently" determine whether the facts admitted constitute cause for discipline. *Kennedy v. Missouri Real Estate Commission*, supra.762 S.W.2d 454, 456-57 (Mo. App., E.D. 1988).

Bellington's admission does not identify Eighteen Investments, LLC as the company with which Fox had a controlled business arrangement. The regulation defines a "controlled business relationship" as "an arrangement in which a real estate licensee…has either an affiliate relationship with or a direct or beneficial ownership interest of more than one percent (1%) in a provider of settlement services." 20 CSR 2250-8.110(4)(A)(2.). While we know Fox was the

[8] The regulation also provides details about the form to be used. Those details are not relevant here.
[9] Transcript at 43-44.
[10] Petitioner's Exhibit __, Request for Admissions directed to Bellington, #22.

designated broker for Bellington, the record does not clearly establish to what extent he held an ownership interest in Eighteen Investments, LLC.

McMullen's testimony further muddied the waters by claiming at different points that Eighteen Investments, LLC was "owned in part by Bellington,"[11] or "either wholly or partially owned" by Fox or Michael Litz.[12] Even if we assume Eighteen Investments was the company to which Fox referred his brokerage client (and no such assumption would be appropriate, given the MREC's burden of proof), no additional evidence was presented from which we could discern whether Fox had a "controlled business relationship" with Eighteen Investments, LLC as defined by the regulation.

Because of the vagueness of the admission, the requirements of the regulation, and the lack of additional supporting evidence, we cannot find that Fox violated 20 CSR 2250-8.110(4)(B) and do not find cause for discipline under this regulation.

J. Violation of §339.100.2(1) by Bellington and Fox

Section 339.100.2(1) provides for discipline of a broker's license for:

> Failure to maintain and deposit in a special account, separate and apart from his or her personal or other business accounts, all moneys belonging to others entrusted to him or her while acting as a real estate broker or as the temporary custodian of the funds of others, until the transaction involved is consummated or terminated, unless all parties having an interest in the funds have agreed otherwise in writing.

The MREC charges that Bellington violated this statute, but its amended complaint uses only the language of the statute to describe Bellington's misconduct, with no specific facts. The MREC's Request for Admission also employed the language of the statute, without specific facts relating to alleged misconduct by Bellington. Consequently, Bellington's failure to respond is

[11] Transcript, at 62-63.
[12] Transcript, at 90-91.

indeed an admission, but it yields few facts. The MREC offered no other evidentiary support for its argument.

While we are somewhat tempted to permit the MREC's allegation and Bellington's admission to establish the needed facts for discipline, to do so would ignore the procedural due process problem posed here. In *Missouri Dental Board v. Cohen*, 867 S.W. 2d. 295 (Mo. App. W.D. 1993), the Dental Board's complaint alleged respondent was subject to discipline, in pertinent part, under § 332.321.2.; no factual allegations were made to describe what conduct of the respondent the Board contended violated the statute. The Court held the Board's allegation was insufficient to allow the respondent to prepare a viable defense. Citing *Duncan v. Mo. Bd. for Architects, Professional Engineers and Surveyors*, 744 S.W. 2d. 524, 529 (Mo. App. 1988), the Court stated, "At minimum, due process requires that there be 'greater specificity setting forth the conduct deemed to establish the statutory ground for discipline.'" *Id.* at 296.

Procedural due process requires that the complaint specify the exact basis for any disciplinary action. The MREC has failed to allege specific facts describing what conduct by Bellington or Fox violated § 339.100.2(1). Although we might infer from Respondents' silence that a violation occurred, we can make no such finding in the absence of facts established by admissible evidence. We find no violation of § 339.100.2(1) in Count I of the complaint.

K. Violation of §339.100.2(3) by Fox and Bellington

Bellington admitted it and Fox failed within a reasonable time to account for or to remit money or other property coming into their possession which belonged to others, and that such conduct is cause for discipline under § 339.100.2(3). As we noted above, the language of the admission is identical to the language of this subsection. We can find no facts supporting cause to discipline Fox or Bellington for violation of § 339.100.2(3).

L. Violations of §339.100.2(15) by Fox and Bellington

Pursuant to § 339.100.2(15), a licensee is subject to discipline for

> Violation of, or attempting to violate, directly or indirectly, or assisting or enabling any person to violate, any provision of sections 339.010 to 339.180 and sections 339.710 to 339.860, or of any lawful rule adopted pursuant to sections 339.010 to 339.180 and sections 339.710 to 339.860[.]

We have found Bellington violated §§ 339.100.2(3) and 339.105.1, and 20 CSR 2250-8.120(4), 20 CSR 2250-8.096(1)(A)(6), and 20 CSR 2250-8.096(1)(A)(2). Therefore, cause exists to discipline Bellington under § 339.100.2(15).

M. Bellington's violation of § 339.100.2(19)

Bellington admits "[t]he pattern of mishandling funds in which others had an interest and violations of statute and regulations set forth [in the Request for Admissions] constitutes [a]ny other conduct which constitutes untrustworthy, improper or fraudulent business dealings, and demonstrates bad faith or incompetence, misconduct, or gross negligence, such that there is cause for discipline under the terms of Section 339.100.2(19)."[13] This admission tracks the language of this subdivision, which makes a licensee subject to discipline for

> Any other conduct which constitutes untrustworthy, improper, or fraudulent business dealings, demonstrates bad faith or incompetence, misconduct, or gross negligence[.]

§ 339.100.2(19).

The MREC urges us find additional grounds for discipline under this subsection based on Bellington's admission, but to do so would ignore the plain meaning of "any other conduct" as used here. The adjective "other" means "not the same: DIFFERENT[.]"[14] Therefore, subdivision (19) refers to conduct *different than* the conduct referred to in the remaining

[13] Petitioner's Exhibit 2-2a, Request for Admission #26.
[14] *Webster's Third International Dictionary (Unabridged)* 1598 (1986)

subdivisions of the statute. We have found some of the conduct of Bellington and Fox is cause for discipline under § 339.100.2(3) and (15). If there is "other" conduct at issue, the MREC has failed to bring it to our attention in its post-hearing brief. The reference in the admission to "the pattern of mishandling of funds in which others had an interest" is ambiguous, as it fails to identify whether it relates to the actions of Fox or Bellington, or both. Therefore, we find no cause for discipline Fox or Bellington under § 339.100.2(19).

II. Count II

A. Violations of § 339.105.1 by Bellington

MREC argues Bellington violated § 339.105.1 when its sales escrow accounts at Regions Bank, National City Bank, and Royal Bank had temporary shortages caused by bank service fees Bellington failed to pay. Section 339.105.1 provides:

> Each broker who holds funds belonging to another shall maintain such funds in a separate bank account in a financial institution which shall be designated an escrow or trust account. This requirement includes funds in which he or she may have some future interest or claim. Such funds shall be deposited promptly unless all parties having an interest in the funds have agreed otherwise in writing. No broker shall commingle his or her personal funds or other funds in this account with the exception that a broker may deposit and keep a sum not to exceed one thousand dollars in the account from his or her personal funds, which sum shall be specifically identified and deposited to cover service charges related to the account.

Bellington wrote checks drawn on its sales escrow accounts which were returned for insufficient funds. As a result, it incurred bank service fees which were not replenished by deposits of its own funds. In permitting escrowed funds to be used to pay its bank service fees, Bellington commingled its personal funds in the accounts. Section 339.105.1 permits a broker to maintain up to $1000 in personal funds in its escrow account to cover service charges related to the account if specifically identified and deposited for such purpose, but there was no evidence Bellington had done so. Bellington admitted its conduct violated § 339.105.1, and we agree.

B. Bellington's failure to timely deposit money into the escrow account and early disbursal from the escrow account

The MREC contends Bellington's failure to make a prompt deposit of escrow funds into its escrow account, and its making an early disbursal from the escrow account violated § 339.105.1 and 20 CSR 2250-8.120(4). The statute and regulation require a broker to promptly deposit funds coming into its possession, including funds in which the broker may have some future interest or claim, and to disburse them to the appropriate parties at the time the transaction is completed. They also prohibit commingling of the broker's personal funds in the escrow account, unless specifically identified to cover bank service fees. § 339.105.1; 20 CSR 2250-8.120(4).

Bellington admits executing a sale contract with Syed and Asma Rizvi on April 7, 2009 and accepting their $2500 earnest money deposit to hold in escrow until the closing date of May 1, 2011; it further admits the funds were not deposited into its sales escrow account at Regions Bank until April 28, 2009. On August 26, 2009, prior to the closing of the transaction, Bellington disbursed the Rizvis' earnest money from its sales escrow account and transferred it directly to Eighteen Investments' account. Bellington admits its conduct in this regard violated § 339.105.1, and 20 CSR 2250-8.120(4).

By waiting nearly three weeks to deposit the Rizvis' earnest money in its sales escrow account, Bellington failed to deposit the funds "promptly" as required by § 339.1051.1. "Promptly" means "in a prompt manner; at once."[15] Taking three weeks to make a deposit does not meet any definition of "prompt." We find Bellington violated § 339.105.1.

Regulation 20 CSR 2250-8.120(4) states:

> Each broker shall deposit into the escrow or trust account all funds coming into the broker's possession as set out in section 339.100.2(1), RSMo, including funds

[15] Merriam-Webster's Collegiate Dictionary, Eleventh Edition, at 994.

> in which the broker may have some future interest or claim and including, but not limited to, earnest money deposits, prepaid rents, security deposits, loan proceeds, and funds paid by or for the parties upon closing of the transaction. No broker shall commingle personal funds or other funds in the broker's escrow account except to the extent provided by section 339.105.1, RSMo. Commissions payable must be removed from the escrow account at the time the transaction is completed. After the transaction is completed, interest payable shall be disbursed to the appropriate party(ies) from the escrow account no later than ten (10) banking days following the receipt of the next statement of the escrow account. When the licensee receives all interest earned, interest payable to a licensee must be removed from the escrow account within ten (10) banking days following the receipt of the next statement of the escrow account.

The MREC argues—and Bellington admits—that by making a disbursement of the Rizvis' earnest money from its escrow account prior to the closing of the transaction, Bellington violated this regulation. We agree. A broker may make disbursements from the escrow "at the time the transaction is completed," not before. Because the Rizvi transaction had not yet closed, Bellington had no cause to remove the earnest money from its escrow account prematurely, or to transfer the funds to Eighteen Investments. We find Bellington violated 20 CSR 2250-8.120(4).

C. Bellington's failure to register an escrow account

Bellington deposited funds in escrow accounts at Royal Bank and National City Bank that were not registered with the MREC. The MREC contends this conduct violated § 339.105.2, which provides:

> Each broker shall notify the commission of his or her intent not to maintain an escrow account, or the name of the financial institution in which each escrow or trust account is maintained, the name and number of each such account, and shall file written authorization directed to each financial institution to allow the commission or its authorized representative to examine each such account; such notification and authorization shall be submitted on forms provided therefor by the commission. A broker shall notify the commission within ten business days of any change of his or her intent to maintain an escrow account, the financial institution, account numbers, or change in account status.

Bellington admitted the conduct, and the violations of the statute. Additionally, MREC's auditor testified that Bellington was using the National City Bank account, which was not

registered with the MREC, as an escrow account.[16] We find cause to discipline Bellington's license for violation of § 339.105.2.

D. Bellington's violations of § 339.105.3

Section § 339.105.3 requires:

> In conjunction with each escrow or trust account a broker shall maintain books, records, contracts and other necessary documents so that the adequacy of said account may be determined at any time. The account and other records shall be provided to the commission and its duly authorized agents for inspection at all times during regular business hours at the broker's usual place of business.

The MREC contends Bellington violated this provision when its agents failed to keep necessary records for the National City Bank escrow fund. Bellington admits the conduct and the violation.

The MREC's audit revealed Bellington maintained no bank statements or outstanding check register for its National City account.[17] Account statements and a check register are necessary records to determine the adequacy of the account. Cause exists to discipline Bellington's license under § 339.105.3.

E. Violation of § 339.100.2(19)

The MREC asserts Bellington is subject to discipline for improper business dealings under § 339.100.2(19) because 342 of Bellington's checks were returned for insufficient funds in ten months. Bellington's failure to respond to the MREC's Request for Admission constitutes an admission of this conduct and of the violation.[18]

As noted earlier, § 339.100.2(19) allows discipline for "[a]ny other conduct which constitutes…improper business dealings." In our previous analysis of this subsection, we noted that conduct charged under other sections of the statute is not "other conduct" subject to

[16] Transcript at 84.
[17] Transcript, at 85.
[18] Petitioner's exhibit 2-2a, Request for Admission #38.

discipline under § 339.100.2(19). However, Bellington's numerous returned checks were not alleged as grounds for discipline elsewhere in the MREC's complaint; as such, this is clearly "other conduct" as contemplated by this subsection.

"Improper" is defined as "not in accord with fact, truth, or right procedure … not in accord with propriety, modesty, good manners, or good taste[.]"[19] We have no trouble concluding that writing 342 insufficient funds checks is an improper business practice. We find cause to discipline Bellington's license under § 339.100.2(19).

F. Depositing funds into Eighteen Investments' operating account instead of an escrow account

Bellington admits it recorded rent payments as being deposited into its Royal Bank account, but deposited the funds directly into Eighteen Investments' operating account at Lindell Bank. The MREC argues, without objection from Bellington, that such conduct constituted commingling of funds, failure to hold received rent in a dedicated escrow account, and improper business practices, in violation of §339.105.1. Section 339.105.1 provides, in relevant part:

> Each broker who holds funds belonging to another shall maintain such funds in a separate bank account in a financial institution which shall be designated an escrow or trust account. This requirement includes funds in which he or she may have some future interest or claim[.]

Bellington's failure to deposit rent payments into its escrow account violates this subsection, which requires such funds to be deposited into an escrow account. By depositing the rent funds into Eighteen Investments' operating fund, Bellington commingled funds. We find cause for discipline under § 339.105.1.

Finally, the MREC contends Bellington's actions are also "improper business practices" in violation of § 339.105.1. That section does not mention improper business practices. Regardless of Bellington's admission that it is subject to discipline under this subsection for

[19] *Webster's Third International Dictionary (Unabridged)* 1137 (1986).

"improper business practices," we decline to make such a finding because it is not supported by the statute.

G. Violation of § 339.780.2

The MREC asserts as cause for discipline under § 339.780.2 Bellington's management of property for 28 different property owners without having a written management agreement in place from December 1 through 31, 2008. Bellington admits the conduct and the violation.

Section 339.780.2 provides:

> Before engaging in any of the activities enumerated in section 339.010, a designated broker intending to establish a limited agency relationship with a seller or landlord shall enter into a written agency agreement with the party to be represented. The agreement shall include a licensee's duties and responsibilities specified in section 339.730 and the terms of compensation and shall specify whether an offer of subagency may be made to any other designated broker.

Section 339.010.3 defines a "real estate broker" as one who "[n]egotiates or offers or agrees to negotiate the sale, exchange, purchase, rental or leasing of real estate," among other activities. Before acting as a property manager, Bellington was required by § 339.780.2 to enter into a written agreement describing its duties, responsibilities, and terms of compensation for its services; it failed to do so in 28 instances. We find cause to discipline Bellington under § 330.780.2.

H. Violation of § 339.100.2(14)

Bellington admits advertising 709 Robert Avenue and 3712 Fairview for sale at prices different from those authorized by the listing contract, in violation of § 339.100.2(14). That subdivision authorizes discipline when a real estate broker "place[s] a sign or advertise[s] any property offering it for sale or rent without the written consent of the owner or his duly authorized agent." § 339.100.2(14).

A broker violates this subsection if it exceeds a property owner's written grant of authority to advertise property at a specified sale price. In advertising the Robert Avenue and Fairview properties at prices different than authorized by the listing agreements, Bellington acted without the property owner's written consent. Such conduct is grounds to discipline Bellington under § 339.100.2(14).

I. Listing a property for sale without written authorization

Similar to its preceding argument, the MREC contends Bellington is subject to discipline for advertising property at 23 Girard Drive for sale without the owner's written authorization, in violation of § 339.100.2(14) and 20 CSR 2250-8.090(1). Section 339.100.2(14) authorizes discipline when a real estate broker "place[s] a sign on or advertise[s] any property offering it for sale or rent without the written consent of the owner or his or her duly authorized agent." Regulation 20 CSR 2250-8.090(1) is identical.

Bellington admits the conduct and the violations. As we noted above, a broker cannot exceed the authority of its principal; here, Bellington had no authority whatsoever from the owner to advertise the Girard property for sale. Bellington is subject to discipline for violating § 339.100.2(14) and 20 CSR 2250-8.090(1).

J. Violation of 20 CSR 2250-8.090(4)(A)(13)

The MREC contends Bellington's failure to include the city or street address of properties in three listing agreements insufficiently identified the properties, in violation of 20 CSR 2250-8.090(4)(A)(13). The regulation requires:

> (A) Every written listing agreement or other written agreement for brokerage services shall contain all of the following:
>
> * * *
>
> 13. The legal description or the complete street address of the property, which includes the city where the property is located; or, in the absence of a legal

> description or address, a clear description which unmistakably identifies the property[.]

Bellington admits the conduct, and the violation.[20] Additionally, Bellington's contracts for 3712 Fairview[21] and 709 Robert[22] failed to include the city or a clear description of the property. We find in each instance that Bellington violated 20 CSR 2250-8.090(4)(A)(13).

K. Violations of 20 CSR 2250-8.090(4)(A)(14)

Bellington admits its listing agreements for six properties failed to describe the home warranty, the minimum commission, the protection period, and/or the minimum listing commission.[23] The MREC contends Bellington's omissions violated 20 CSR 2250-8.090(4)(A)(14):

> Every written listing agreement or other written agreement for brokerage services shall contain all of the following:
>
> * * *
>
> 14. All other terms and conditions under which the property is to be sold, leased, or exchanged[.]

The home warranty, minimum commission, the protection period, and the minimum listing commission are essential "terms or conditions" under which the properties would be sold, and should have been included in the listing agreements. Bellington violated 20 CSR 2250-8.090(4)(A)(14).

L. Violation of 20 CSR 2250-8.090(9)(A)

Pursuant to 20 CSR 2250-8.090(9)(A), "[e]very written property management agreement or other written authorization between a broker and the owners of the real estate shall: (A) Identify the property to be managed." The MREC maintains Bellington violated this regulation

[20] Pet. Ex. 2, ¶48.
[21] Pet. Ex. 35.
[22] Pet. Ex. 36.
[23] Pet. Ex. 2 at ¶48.

by failing to note the street address of the properties in its January 1, 2009 property management agreement with Bell Mortgage Partnership. Bellington admits the conduct, and the violation. [24]

Unlike other subdivisions of this regulation, 20 CSR 2250-8.090(9)(A) does not specifically require a legal description, street address or city of the subject property to be included in a property management agreement; it merely requires that the agreement "identify the property." We find some logic in this difference—a property owner granting authority to a broker to manage property on its behalf might not be confused if the property management agreement omits the property's address, but identifies it in some other way. The MREC did not produce a copy of the PMA, but descriptions such as a building's name, or an intersection where it is located may well suffice to "identify the property to be managed."

The MREC has the burden of proof in this case, and cannot rely on our speculation to provide the additional facts needed to establish grounds for discipline. Bellington's admission of the violation will not support such finding when the facts admitted are insufficient. Therefore, we must conclude the MREC failed to meet its burden on this issue. We find no violation of 20 CSR 2250-8.090(9)(A).

M. Violations of 20 CSR 2250-8.090(9)(I)

Bellington admitted its six property management agreements entered into on January 1, 2009 failed to permit or prohibit Bellington from acting as a transaction broker. [25] The MREC argues Bellington's failure to address this issue in these agreements violated 20 CSR 2250-8.090(9)(I), which provides:

> Every written property management agreement or other written authorization between a broker and the owners of the real estate shall: … (I) Contain a statement which permits or prohibits the designated broker and/or affiliated

[24] Pet. Ex. 2 at ¶49.
[25] Pet. Ex. 2 at ¶50.

licensee from acting as a transaction broker and if permitted, the duties and responsibilities of a transaction broker.

Bellington's admissions are sufficient for us to find its conduct violated this regulation. We find cause for discipline under 20 CSR 2250-8.090(9)(I).

N. Violation of § 339.780.3

The MREC contends that Bellington violated § 339.780.3 when its agent, Martin Levin, assisted a real estate buyer as buyer's agent without entering into a written agency agreement with the buyer.

Section 339.780.3 states that:

> Before or while engaging in any acts enumerated in section 339.010, except ministerial acts defined in section 339.710, a designated broker acting as a single agent for a buyer or tenant shall enter into a written agency agreement with the buyer or tenant. The agreement shall include a licensee's duties and responsibilities specified in section 339.740 and the terms of compensation.

Bellington admitted that Levin disclosed in a sales contract for 218 Clear Meadows Drive he was acting as buyer's agent in the transaction, but had not previously entered into a written agency agreement with the buyer, in violation of § 339.780.3.[26] The language of the statute is clear: a designated broker, unless engaging in ministerial acts, must have a written agency agreement before undertaking representation of a buyer in a transaction. Bellington is subject to discipline for violating § 339.780.3.

O. Violation of 20 CSR 2250-8.096(1)

MREC contends that Bellington entered into 26 transactions without a written disclosure agreement, in violation of 20 CSR 2250-8.096(1). That regulation provides:

> Licensees acting with or without a written agreement for brokerage services pursuant to sections 339.710 to 339.860, RSMo, are required to have such relationships confirmed in writing by each party to the real

[26] Pet. Ex. 2 at ¶51.

> estate transaction on or before such party's first signature to the real estate contract. Nothing contained herein prohibits the written confirmation of brokerage relationships from being included or incorporated into the real estate contract, provided that any addendum or incorporated document containing the written confirmation must include a separate signature section for acknowledging the written confirmation that shall be signed and dated by each party to the real estate transaction.

Bellington admitted the conduct and the violations.[27] In each of these 26 transactions, Bellington was required to make written disclosure of its brokerage relationship, but failed to do so. Cause exists to discipline Bellington for violation of 20 CSR 2250-8.096(1).

P. Violation of 20 CSR 2250-8.096(1)(A)(2)

The MREC urges us to find Bellington violated 20 CSR 2250-8.096(1)(A)(2) by executing six brokerage disclosure statements which did not identify the source or sources of compensation. The regulation requires that "(A) Written confirmation [of brokerage relationships] must … 2. Identify the source or sources of compensation."

Bellington admitted its agents executed six written brokerage disclosure statements which did not identify the source of compensation. We find Bellington violated 20 CSR 2250-8.096(1)(A)(2).

Q. Violation of 20 CSR 2250-8.096(1)(A)(3)

The MREC points to five brokerage disclosure statements executed by Bellington's agents which failed to confirm the brokerage relationship was timely disclosed to the tenant or its agent as violations of 20 CSR 2250-8.096(1)(A)(3). Pursuant to that regulation,

> Written confirmation [of brokerage relationships] must …
> 3. Confirm that the brokerage relationships, if required by rule or regulation, were disclosed to the seller/landlord and/or buyer/tenant or their respective agents and/or transaction brokers no later than the first showing, upon first contact, or immediately upon the occurrence of any change to that relationship.

[27] Pet. Ex. 2, Request for Admission #56.

Bellington admitted the conduct and the violation. Cause exists to discipline Bellington for violation of 20 CSR 2250-8.096(1)(A)(3).

R. Violations of 20 CSR 2250-8.096(1)(A)(6)

Bellington admits its agents failed to sign and date its brokerage disclosure statement for 8531 Antler, and failed to date its brokerage disclosure statements for 708 Lavinia Place and 1528 S. Big Bend. The MREC argues this conduct violated 20 CSR 2250-8.096(1)(A)(6), which requires that a "[w]ritten confirmation [of broker relationships] must …[b]e signed and dated by the disclosing licensees on or before the contract date." Bellington's admission of the conduct and the violation are sufficient to support a finding that grounds for discipline exist under 20 CSR 2250-8.096(1)(A)(6).

S. Violation of 20 CSR 2250-8.100(1)

The MREC alleges that, in violation of 20 CSR 2250-8.100(1), Bellington's agents prepared and executed four sales contracts that did not specify the city where the property was located. The regulation states:

> Every licensee shall make certain that all of the terms and conditions authorized by the principal in a transaction are specified and included in an offer to sell or buy and shall not offer the property on any other terms. Every written offer shall contain the legal description or property address, or both, and city where the property is located, or in the absence of, a clear description unmistakably identifying the property.

Bellington admits it failed to specify the city in which the properties were located in these sales contracts, and that it violated the regulation. However, 20 CSR 2250-8.100(1) does not require a licensee to include the name of the city in which the property is located in every instance. The regulation sets out four scenarios for the contents of the written offer:

(1) The legal description and city where the property is located.

(2) The property address and city where the property is located.

(3) Both the legal description and the property address as well as the city where the property is located.

(4) The legal description and property address and, in the absence of a stated city, a clear description unmistakably identifying the property.

Omission of the name of the city in which a property is located does not always constitute a violation of the regulation, so Bellington's admission of that fact alone is not sufficient to find a violation. However, the MREC offered one of the contracts at issue into evidence, the Rizvi contract.[28] This contract includes the street address of the property, 218 Clear Meadows, and identifies it as being located in St. Louis County, Missouri; it contains no legal description, city, or other clear description unmistakably identifying the property. Because the other three contracts at issue were not produced by the MREC, and the MREC has the burden of proof in this case, we make no assumptions as to their contents.

We find the inadequate property description in the Rizvi sale contract establishes cause to discipline Bellington under 20 CSR 2250-8.100(1).

T. Violations of 20 CSR 2250-8.150(3) and 20 CSR 2250-8.160(1)

The MREC asserts that Bellington violated 20 CSR 2250-8.150(3) and 20 CSR 2250-8.160(1) by failing to retain copies of the buyers' closing statements in six instances.

Regulation 20 CSR 2250-8.150(3) provides: "the brokers for the buyer and the seller shall retain legible copies of both buyer's and seller's signed closing statements." Regulation 20 CSR 2250-8.160(1) states:

> Every broker shall retain for a period of at least three (3) years true copies of all business books; accounts, including voided checks; records; contracts; brokerage relationship agreements; closing statements and correspondence relating to each real estate transaction that the broker has

[28] Pet. Ex. 16.

> handled. The records shall be made available for inspection by the commission and its authorized agents at all times during usual business hours at the broker's regular place of business. No broker shall charge a separate fee relating to retention of records.

Bellington admits the conduct and the violation of both regulations.[29] We find Bellington's conduct violated 20 CSR 2250-8.150(3) and 20 CSR 2250-8.160(1).

U. Violations of 20 CSR 2250-8.160(2)

In fourteen instances, Bellington failed to retain vendor invoices. The MREC argues, and Bellington does not dispute, such conduct violated 20 CSR 2250-8.160(2), which provides:

> Every broker shall retain for a period of at least three (3) years true copies of all property management agreements, correspondence or other written authorization relating to each real estate transaction relating to leases, rentals or management activities the broker has handled. The broker must also retain all business books, accounts and records unless these records are released to the owner(s) or transferred to another broker by written detailed receipt or transmittal letter agreed to in writing by all parties to the transaction.

We agree, and find cause for discipline under 20 CSR 2250-8.160(2).

V. Violation of § 339.100.2(1) by Fox and Bellington

The MREC alleges in Count II of its complaint that Fox and Bellington violated § 339.100.2(1) by failing to maintain client funds in a special account.[30] Section 339.100.2(1) provides that the MREC may discipline a licensee for:

> Failure to maintain and deposit in a special account, separate and apart from his or her personal or other business accounts, all moneys belonging to others entrusted to him or her while acting as a real estate broker or as the temporary custodian of the funds of others, until the transaction involved is consummated or terminated, unless all parties having an interest in the funds have agreed otherwise in writing.

[29] Pet. Ex. 2 at ¶61.
[30] *Amended Complaint* at ¶83.

However, the MREC's complaint does not specifically state how Fox and Bellington violated this section. We assume, based on the paragraphs that follow, that the MREC intended to rely on the facts pled under Count II. We will proceed on that assumption.

The only item pled in Count II that presents a potential violation of this subsection is Bellington's early disbursal of escrow funds.[31] MREC alleges that Bellington made an early dispersal from the escrow account to Eighteen Investments in connection with the Rizvi contract.[32] Bellington admitted it failed to deposit the Rizvis' earnest money into its Regions Banks sales escrow account until April 28, 2009, 21 days after receiving it, and that it kept the funds in that account until Bellington transferred it directly to Eighteen Investments on August 26, 2009. The closing date of the transaction was not until May 1, 2011. Based on these facts, we find Bellington prematurely disbursed the Rizvis' earnest money from its sales escrow account, prior to the consummation or termination of the transaction. We find cause for discipline under § 339.100.2(1).

W. Violation of §339.100.2(3)

The MREC argues that Fox and Bellington failed within a reasonable time to remit money that belonged to others in violation of § 339.100.2(3). Pursuant to this provision, the MREC may discipline a licensee for "failing within a reasonable time to account for or to remit any moneys, valuable documents or other property, coming into his or her possession, which belongs to others." § 339.100.2(3).

We found several instances where Fox and Bellington failed to account for client funds in its possession within a reasonable time. Bellington failed to account for the Rizvis' earnest money deposit for nearly three weeks between April 7 and April 28, 2009.

[31] Amended Complain at ¶52.
[32] *Id.*

Additionally, Bellington admits it transferred funds from its National City account or allowed bank service charges to be deducted from the account with no corresponding deposit of broker funds, which resulted in shortages in the account. Checks drawn on Bellington's Royal Bank account were returned for insufficient funds on at least 76 occasions, resulting in bank fees of $15,559.30 which were deducted from client funds without being reimbursed or replenished by Bellington. It recorded rent payments as deposited into its Royal Bank account, but instead deposited the rent payments directly into Eighteen Investment's account at Lindell Bank. As of November 30, 2009, Bellington's rent roll reflected a balance of $516,990.43, but its Royal Bank account contained only a balance of $6,186.02.[33]

These significant irregularities demonstrate that Bellington repeatedly failed to account for a large amount of client funds within any reasonable time. We find there is cause to discipline of Bellington and Fox under § 339.100.2(3).

X. Violation of § 339.100.2(15)

Pursuant to § 339.100.2(15), the MREC may discipline a licensee for violating any provision of §§ 339.010 to 339.180 or the lawful regulations adopted by the MREC.

We have found Bellington violated the following statutes and regulations in Count II:

- § 339.100.2(1)
- § 339.100.2(3)
- § 339.105.1
- § 339.105.2
- § 339.105.3

[33] Pet. Ex. 2 at ¶42.

- § 339.780.2
- § 339.780.3
- 20 CSR 2250-8.090(4)(A)(13)
- 20 CSR 2250-8.090(4)(A)(14)
- 20 CSR 2250-8.090(9)(I)
- 20 CSR 2250-8.096(1)
- 20 CSR 2250-8.096(1)(A)(2)
- 20 CSR 2250-8.096(1)(A)(3)
- 20 CSR 2250-8.096(1)(A)(6)
- 20 CSR 2250-8.100(1)
- 20 CSR 2250-8.150(3)
- 20 CSR 2250-8.160(1)
- 20 CSR 2250-8.160(2)

Therefore, we find cause to discipline Bellington's license under § 339.100.2(15).

In Count II, we also found Fox violated §§ 339.100.2(1) and (3). Fox is subject to discipline under § 339.100.2(15).

Y. Violations of §339.100.2(19)

A licensee is subject to discipline under § 339.100.2(19) for "*any other conduct* which constitutes untrustworthy, improper, or fraudulent business dealings or demonstrates bad faith or gross incompetence." (Emphasis added.) The adjective "other" means "not the same: DIFFERENT [.]"[34] Therefore, we must look to *different misconduct* of Respondents--conduct not previously considered--to support discipline under this provision.

[34] *Webster's Third International Dictionary (Unabridged)* 1598 (1986)

The MREC argues that "other conduct" may be found in Fox and Bellington's numerous violations of statutes and regulations, which constitute a pattern and practice of mishandling client funds. But viewing the separate instances of misconduct here in the aggregate does not convert them into a separate act of misconduct. The "pattern" here arises from the fact that Fox and Bellington committed repeated and serious violations of their legal responsibilities as licensees; in each instance where the MREC established such a violation by a preponderance of the admissible evidence, we found grounds for discipline. The MREC points to no separate or additional facts constituting "other conduct" which has not already been addressed, and we find none. Accordingly, we find no cause for discipline under § 339.019.2(19).

Conclusion

Fox and Bellington are subject to discipline under § 339.100.2(1), (3), (14), and (15).

\s\ Mary E. Nelson
MARY E. NELSON
Commissioner